

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,
Plaintiff,
v.
NERIO GOMEZ,
Defendant.

Case No.: 3:14-CR-3000-DMS

**ORDER DENYING MOTION FOR
SENTENCING MODIFICATION
UNDER 18 U.S.C. § 3582(C)**

On June 11, 2020, Defendant Nerio Gomez filed a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). The United States filed a response in opposition to Defendant's motion, and Defendant filed two supplemental memoranda. For the reasons given herein, the Court denies Defendant's motion.

I.

BACKGROUND

On November 21, 2014, Defendant Gomez pled guilty to possession of methamphetamine with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1). (ECF No. 28). Defendant was sentenced to ten years and ten months in prison and five years of supervised release. (ECF No. 44). Defendant's projected release date is in February of 2024. (ECF No. 46 at 2).

1 Defendant is forty-five years old and suffers from Chronic Polyneuropathy and
 2 poliomyelitis. (*Id.* at 2, 3). Defendant’s health conditions require him to receive significant
 3 assistance with everyday tasks, like brushing his teeth, going up and down stairs, and using
 4 the bathroom. (*Id.* at 5, 6). This places Defendant in constant contact with others. (*Id.* at
 5 6). Defendant alleges that although everyone in the facility in which he is housed must
 6 wear a mask, no one who helps him is provided with gloves. (*Id.* at 6). Defendant has also
 7 been diagnosed with Hepatitis C, which puts him at a heightened risk of serious injury or
 8 death if he were to contract COVID-19. (*Id.* at 7).

9 On July 24, Defendant’s counsel received information indicating Defendant was
 10 going to be transferred from FCI Safford, where he is currently housed, to a new facility.
 11 (ECF No. 50 at 1). Defendant alleges that the transfer places him at significant risk of
 12 contracting COVID-19. (*Id.* at 1–2). As of July 29, 2020, one staff member at Safford
 13 prison has tested positive for COVID-19 and no inmates have tested positive. (ECF No.
 14 51 at 1; ECF No. 49 at 8).

15 Based on these allegations, Defendant filed the present motion for compassionate
 16 release under 18 U.S.C. § 3582(c)(1)(A). (ECF No. 46). Defendant seeks the modification
 17 of his sentence to time served, or alternatively, to supervised release with home
 18 confinement. (*Id.* at 1). The United States opposes Defendant’s motion. (ECF No. 49).

19 II.

20 DISCUSSION

21 In general, a court may not modify a sentence of incarceration once it has been
 22 imposed, unless expressly permitted by statute or Rule 35 of the Federal Rules of Criminal
 23 Procedure. *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003). The First Step Act
 24 (“FSA”) is such a statute. *See* Pub L. 115-391, 132 Stat. 5194, 5239 (2018). Among the
 25 criminal justice reforms implemented by the FSA, Congress amended 18 U.S.C. §
 26 3582(c)(1)(A) to allow the defendant to move the district court for compassionate release
 27 after exhausting the Bureau of Prison (“BOP”) process.
 28

Section 3582(c) of Title 18 of the United States Code provides that a court may not modify a term of imprisonment except “upon motion of Director of the Bureau of Prisons, or upon motion of the defendant.” A defendant may bring a § 3582(c) motion after he has “fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons” to act or “the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.” 18 U.S.C. § 3582(c)(1)(A). Administrative exhaustion is a prerequisite to filing the motion in district court, and “[e]xhaustion occurs when the BOP denies a defendant’s application or lets thirty days pass without responding to it.” *United States v. Mondaca*, No. 89-cr-0655-DMS, 2020 WL 1029024, at *2 (S.D. Cal. Mar. 3, 2020) (internal quotation marks and citations omitted). Here, Defendant submitted his request for compassionate release to the warden on April 11, 2020. (ECF No. 46 at 9). On April 30, 2020, the warden denied Defendant’s request. (*Id.* at 9). Because the warden has denied Defendant’s request, the Court may address the motion on its merits.

The FSA allows a district court to modify a sentence and grant compassionate release if it finds “extraordinary and compelling reasons” warrant such a reduction, the reduction complies with 18 U.S.C. § 3553(a), and the defendant “is not a danger to the safety of any other person or to the community[.]” *See* 18 U.S.C. § 3582(c)(1)(A); United States Sentencing Guidelines (“U.S.S.G”) § 1B1.13. Defendant contends he meets the foregoing criteria. As the movant, Defendant bears the burden of establishing that he is eligible for a sentence reduction. *See United States v. Jones*, 836 F.3d 896, 899 (8th Cir. 2016).

1. Extraordinary and Compelling Reasons

Defendant argues he is eligible for compassionate release because his underlying health conditions make him particularly vulnerable to COVID-19. The Sentencing Guidelines provide that extraordinary and compelling reasons may exist for compassionate release where a defendant suffers from, among other conditions, “a serious physical or mental condition ... that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not

1 expected to recover.” U.S.S.G § 1B1.13, cmt n.1(A)(i)(I). Defendant has Hepatitis C—a
 2 condition the CDC has declared will increase the risk of serious illness from COVID-19.
 3 Defendant also suffers from Chronic Polyneuropathy and poliomyelitis.

4 The United States does not dispute that Defendant’s medical conditions, combined
 5 with the outbreak of COVID-19, constitute “extraordinary and compelling circumstances.”
 6 (ECF No. 49 at 5-6). Notwithstanding these circumstances, the United States contends
 7 Defendant is not entitled to compassionate release because he has neither demonstrated
 8 that he is not a danger to others or the community nor that the § 3553 factors weigh in favor
 9 of release, given his underlying criminal conduct and extensive criminal history. (ECF No.
 10 49 at 6). The Court agrees.

11 2. Danger to Others or the Community

12 Even where extraordinary and compelling reasons exist, the court must consider
 13 whether the defendant is “a danger to the safety of any other person or to the community,
 14 as provided in 18 U.S.C. § 3142(g)[.]” U.S.S.G. § 1.B1.13(1)(A), (2) cmt. n. 1. To make
 15 this assessment, the Court is directed to the factors set out in § 3142(g), including, among
 16 other things: (1) the nature and circumstances of the offense charged; (2) the history and
 17 characteristics of the person, including character, physical and mental condition, family
 18 ties, employment, financial resources, past conduct, criminal history, and drug and alcohol
 19 abuse; and (3) the nature and seriousness of the danger to any person or the community
 20 that release would impose. These factors are addressed in turn and overlap with the §
 21 3553(a) factors.

22 In this case, Defendant was convicted of possession of methamphetamine with intent
 23 to distribute, a non-violent offense. The United States contends Defendant poses a danger
 24 to the community, despite his medical conditions, because of his conduct in the underlying
 25 case and his prior criminal history. (ECF No. 49 at 7). Defendant was arrested after police
 26 conducted a lawful search of his vehicle and found 445.2 grams actual of
 27 methamphetamine, a digital scale, and a loaded handgun with an obliterated serial number.
 28 (Pre-Sentence Report (“PSR”) ¶ 5). Defendant acknowledges that possession of the gun

1 in his car is an aggravating factor. (ECF No. 46 at 26). Nevertheless, he contends that it
2 was not dangerous because he was physically unable to pick up or hold the gun. (*Id.*).

3 Defendant further states that substance abuse issues played a large part in his actions,
4 and notes that he has completed multiple drug treatment programs, in addition to courses
5 in anger management and relationship skills. (ECF No. 46 at 25-26). Although Defendant
6 needs assistance to accomplish certain tasks, he has been employed in laundry, sewing, and
7 janitorial work while in prison. (ECF No. 46 at 4-5). Defendant asserts that he is physically
8 unable to be a danger to the community as a result of his medical conditions. (ECF No. 46
9 at 26).

10 However, Defendant has an extensive criminal history, with his criminal history
11 points far exceeding the required threshold for the maximum Criminal History Category of
12 VI. (PSR ¶¶ 53-55, 140). Defendant has numerous prior convictions from 1996 to 2014,
13 including for drug crimes, burglary, and driving offenses, such as multiple instances of
14 driving on a suspended license and under the influence of drugs. (PSR ¶¶ 36-52). One
15 conviction involved a high-speed chase during which Defendant struck a civilian and a
16 police officer with his vehicle. (ECF No. 49 at 7; PSR ¶ 48). The Government contends
17 that Defendant's actions underlying the present conviction, as well as his criminal history,
18 "make clear that he is able to and consistently does wreak havoc in the community despite
19 his condition." (ECF No. 49 at 7).

20 The Court agrees. Defendant's demonstrated criminal history spans nearly twenty
21 years, and his possession of a firearm is an aggravating factor in this offense. Although
22 Defendant's progress in custody is commendable, on balance, he has failed to show he
23 would not present a danger to others or the community if released.

24 3. § 3553(a) Factors

25 Finally, the Court must consider "the factors set forth in section 3553(a) to the extent
26 that they are applicable." 18 U.S.C. § 3582(c)(1)(A). Section 3553(a) provides that the
27 sentencing court must impose a sentence that is "sufficient, but not greater than necessary
28 ... (A) to reflect the seriousness of the offense, to promote respect for law, and to provide

1 just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C)
2 to protect the public from further crimes of the defendant; and (D) to provide the defendant
3 with needed educational or vocational training, medical care, or other correctional
4 treatment in the most effective manner[.]” 18 U.S.C. § 3553(a)(2)(A)-(D). The court also
5 must consider, among other factors, “the nature and circumstances of the offense and the
6 history and characteristics of the defendant” and the “need to avoid unwarranted sentence
7 disparities among defendants with similar records who have been found guilty of similar
8 conduct.” *Id.* § 3553(a)(1),(6).

9 Defendant’s offense is serious, particularly in light of his extensive criminal history.
10 He was subject to a ten-year mandatory minimum in this case and was sentenced to 130
11 months, which reflects the seriousness of the offense, the need to deter Defendant and
12 others, and the need to protect society. All of these factors are relevant here and served by
13 the sentence imposed.

14 Defendant contends the six years he has already served in prison have been more
15 punitive due to his disability, and that this time has been sufficient to deter him from future
16 criminal activity. (ECF No. 46 at 32, 33). Nevertheless, Defendant has nearly four years
17 remaining on his sentence, which is significant and warranted under § 3553(a).

18 In support of his argument for release, Defendant cites his difficult childhood
19 circumstances and substance abuse as reasons for his past criminal conduct, and points out
20 that he has taken steps while in prison to address these issues. (ECF No. 46 at 28-29).
21 Defendant has made progress toward rehabilitation, including completing classes, earning
22 certificates, and employment, although on two occasions, Defendant was disciplined for
23 using medication that was not prescribed to him. (ECF No. 46 at 33, 33-34). Defendant
24 further asserts that a modification of his sentence to home confinement or time served will
25 allow him to obtain his GED, which he has not been able to do in prison. (ECF No. 46 at
26 34). The Court credits Defendant’s progress, but must weigh it against his prior criminal
27 conduct and the danger to the community as discussed above.
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1 Although the Court is sympathetic to the risks Defendant faces in light of COVID-
2 19, Defendant is receiving medical care in prison, thus serving the important interests of
3 § 3553(a)(2)(D). Indeed, as of July 24, 2020, Defendant is scheduled to be transferred to
4 another facility due to his higher care level. (ECF No. 50 at 1). Under § 3553(a),
5 Defendant's 130-month sentence is not greater than necessary to address the overarching
6 goals of punishment, deterrence, protection of society, and rehabilitation. These factors
7 weigh against releasing Defendant at this time.

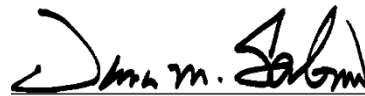
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9 **III.**

10 **CONCLUSION AND ORDER**

11 For the foregoing reasons, Defendant's motion for compassionate release pursuant
12 to 18 U.S.C. § 3582(c)(1)(A) is respectfully denied.

13 **IT IS SO ORDERED.**

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15 Dated: August 20, 2020

16 
17 Hon. Dana M. Sabraw
18 United States District Judge
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